No. 78-836

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEE PHARMACEUTICALS, PETITIONER

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. The judgment of the court of appeals in this civil case was entered on June 29, 1978 (Pet. App. 19a-20a). Petitioner did not seek rehearing in the court of appeals, and it did not obtain an extension of time within which to file a petition. The time provided by 28 U.S.C. 2101(c) within which to file a petition for certiorari therefore expired on September 27, 1978. The petition was not filed until November 22, 1978. The time limit provided by Section 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). The petition therefore should be denied.

2. Petitioner argues, however, that the time limit established by Section 210l(c) should not be enforced in this case because it did not learn of the entry of the judgment until the time to file a petition had expired (Pet. 10-14). We concede, for this purpose, that petitioner's assertion of ignorance is correct. The Court has held,

however, that the timeliness requirements apply even when the delay was beyond the petitioner's control. See, *e.g.*, *Deal* v. *Cincinnati Board of Education*, 402 U.S. 962 (1971) (airline lost all the papers); *Teague* v. *Commissioner of Customs*, 394 U.S. 977 (1969) (unforeseeable snowstorm created a postal delay).

This is not even a case in which petitioner was prejudiced by events beyond its control. Fed. R. App. P. 36 provides that the clerk of the court of appeals "shall, on the date judgment is entered, mail to all parties a copy of the opinion * * *." Petitioner received a copy of the court's opinion, and counsel reasonably should have concluded that judgment had been entered according to the provisions of Rule 36. Counsel then had 90 days within which to file a petition, and the Court would have had jurisdiction even if there were no judgment. See *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978). The time within which to file a petition runs from the entry of judgment, and so petitioner would have had more time if the court of appeals in fact had entered its judgment after the date of its opinion. See *Scofield* v. *NLRB*, 394 U.S. 423, 427 (1969). Here, however, the entry of judgment occurred on the date the opinion was filed, as Rule 36 contemplates will be the ordinary procedure, and the time to file a petition thus began to run immediately.[1]

3. Petitioner argues that it is entitled to file the petition out of time because the clerk of the Ninth Circuit did not

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[1]Once petitioner recognized that a judgment had been entered on June 29, it asked the court of appeals to enter a fresh judgment. The court of appeals declined (Pet. App. 1a), and petitioner challenges this decision (Pet. 12-14). Although petitioner may be correct that the court of appeals had the power to enter a fresh judgment, its decision not to do so is irrelevant to the question of this Court's jurisdiction, for the Court has held that the entry of a fresh judgment without a change in its material terms does not extend the time within which to file a petition. See *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211 (1952); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); R. Stern & E. Gressman, *Supreme Court Practice* 401-402, 419 (5th ed. 1978).

explicitly notify it—and may even had misled it—about the entry of judgment. It relies for this proposition on *Hill* v. *Hawes*, 320 U.S. 520 (1944), which held that a district judge could enlarge a party's time to appeal by vacating and reentering a judgment if the clerk of the court had not given proper notice of the original entry.

This Court has held, however, that reentry of judgments by courts of appeals does not extend the time within which to file a petition.[2] Moreover, petitioner neglects the fact that Fed. R. Civ. P. 77 was amended in 1946 to overturn the result in *Hill*. As the Advisory Committee's note to the 1946 amendment states: "[N]otification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; * * *." 28 U.S.C. (1970 ed.) page 7845. There is no reason for this Court to interpret Fed. R. App. P. 36 to require an extension of time identical in principle to the sort of extension that Fed. R. Civ. P. 77(d) now forbids.

4. At all events, petitioner's substantive challenges to the decision of the court of appeals are insubstantial. The court's opinion is consistent with that of every other court that has addressed the question whether abandoned patent applications are subject to disclosure under the Freedom of Information Act, 5 U.S.C. 552. We rely on

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[2]See note 1, *supra*.

the opinion of the court of appeals (Pet. App. 2a-18a) in urging that the petition for a writ of certiorari be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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